INDEX

CITATIONS

773-167—65

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 972

HOLLAND FURNACE COMPANY, PETITIONER

v.

ELMER J. SCHNACKENBERG, ROGER S. KILEY AND LUTHER M. SWYGERT, CIRCUIT JUDGES

No. 1043

PAUL T. CHEFF, PETITIONER

v.

ELMER J. SCHNACKENBERG, ROGER S. KILEY AND LUTHER M. SWYGERT, CIRCUIT JUDGES

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

DECISION BELOW

The decision of the court of appeals (HF Pet. 2a–11a; C Pet. 18–28) [1] is reported at 341 F. 2d 548.

[1] "HF Pet." refers to the petition for certiorari in No. 972; "C Pet." refers to the petition in No. 1043.

JURISDICTION

The judgment of the court of appeals (341 F. 2d 554; HF Pet. 12a–15a; C Pet. 29–32) was entered on January 27, 1965. Motions for rehearing, vacation of judgment, acquittal, or new trial were denied on February 11, 1965. The petition in No. 972 was filed on March 10, 1965. On February 15, 1965, Mr. Justice Clark extended the time of petitioner in No. 1043 for filing a petition for a writ of certiorari to and including April 12, 1965, and the petition was filed on April 8, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals abused its discretion in imposing a fine of $100,000 upon petitioner in No. 972 for its willful violation of a court order.

2. Whether the court of appeals was required to obtain a pre-sentence report before fixing the punishment of a corporation in a criminal contempt proceeding charging violations of the court of appeals' order.

3. Whether the evidence supports the conviction of petitioner in No. 1043.

4. Whether the sentence of six months' imprisonment imposed upon petitioner in No. 1043 was constitutionally permissible in the absence of a trial by jury.

STATUTE INVOLVED

Section 1(3) of the U.S. Criminal Code, 18 U.S.C. 1(3), reads:

> Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six

months or a fine of not more than $500, or both, is a petty offense.

STATEMENT

Holland Furnace Company, petitioner in No. 972, was convicted by the court of appeals of criminal contempt of that court for willfully violating an order of the court of appeals which had enforced a Federal Trade Commission order to cease and desist from specified fraudulent and oppressive practices in the sale of furnaces and parts to consumers. Paul T. Cheff, petitioner in No. 1043, who had been president and board chairman of the corporation, was also convicted of willfully causing and aiding and abetting in causing the corporation's violations. The court sentenced the corporation to pay a fine of $100,000, and sentenced petitioner Cheff to six months' imprisonment.[2]

The order which was violated was issued by the Court of Appeals for the Seventh Circuit on August 5, 1959, at an early stage of the protracted proceedings for review of the Federal Trade Commission decision. The court then found that immediate enforcement of the Commission's order was necessary to prevent injury to the public and to petitioner's competitors *pendente lite,* and it directed the corporation and its officers to comply with the Commission's order pending judicial review of that order. The court subsequently affirmed the Commission's decision and order (295 F. 2d 302) and, on November 7, 1961, issued a

[2] Two other officers, also convicted, were each fined $500. They have not petitioned for certiorari.

decree making permanent its earlier enforcement order. The Commission's order, as enforced by the court of appeals, directed the company, its officers and employees to cease and desist from making representations that its employees were inspectors and its salesmen heating engineers; from tearing down and dismantling furnaces without permission; and from misrepresenting the condition of dismantled furnaces and the feasibility of their repair.

In March 1962, the Commission filed in the court of appeals a petition for the institution of criminal contempt proceedings against the corporation, supported by 168 affidavits relating to alleged violations. The court issued show cause orders to both petitioners and to other officials of the corporation. The corporation admitted some violations and requested a judgment on the pleadings. Petitioner Cheff filed an answer denying guilt. He also filed a demand for a jury trial, which was denied by the court.

Pursuant to stipulation, the affidavits attached to the contempt petition and certain other documents were considered by the court in lieu of the testimony of live witnesses with regard to the corporation's alleged violations of the order; the hearing dealt primarily with the complicity of petitioner Cheff and other company officials. On January 27, 1965, in the presence of counsel for petitioners and all but one of the other defendants, the court heard counsel for the corporation (who had been excused from attending the hearing), announced and issued its findings and conclusions of law, and entered its order fixing the punishments of those convicted. The court said that it was convinced beyond a reason-

able doubt, on the basis of the entire record, that the company, through a "regular and usual" sales practice, had knowingly, willfully and intentionally violated the order of August 1959. It was also convinced beyond a reasonable doubt that respondent Cheff knowingly, willfully and intentionally caused and aided and abetted in causing violations by the company; that he was the dominant head of the company until May 1962, and was well aware of the condemned sales practices and of the prohibitions in the order; that he made no bona fide attempt to comply or achieve compliance with the order but, on the contrary, pursued a course of conduct designed to construct an apparent compliance and insulate himself from guilt as a facade behind which to continue the condemned sales practices.

ARGUMENT

1. The corporation, petitioner in No. 972, contends that the fine imposed upon it constituted an abuse of discretion in light of the standards prescribed by this Court in *United States* v. *United Mine Workers,* 330 U.S. 258, and *Green* v. *United States,* 356 U.S. 165, 187–189. The record in this case, however, supported the court's conclusion that the 25 specific violations admitted by the corporation were merely representative of "a regular and usual method" (HF Pet. 6a; C Pet. 22) of operations in which petitioner engaged during an extended period of time "throughout the entire territory in which" petitioner conducted its operations (*ibid.*). This flagrant and sustained course of conduct, which admittedly was in violation of the court's order, warranted the imposition of a substan-

tial fine. As this Court observed in *United States* v. *United Mine Workers*, 330 U.S. 258, 303:

> * * * In imposing a fine for criminal contempt, the trial judge may properly take into consideration the extent of the willful and deliberate defiance of the court's order, the seriousness of the consequences of the contumacious behavior, the necessity of effectively terminating the defendant's defiance as required by the public interest, and the importance of deterring such acts in the future. * * *

Moreover, the $100,000 fine was not excessive in light of the serious harm to the consuming public which the corporation caused by its violations of the court order. The total charges to the customers involved in the admitted violations, for example, came to more than $12,200.[3] In addition, between 1956 and 1961 a woman more than 70 years of age was sold seven furnaces for one house at a total cost exceeding $18,500.[4] Other documents in evidence tended to establish additional violations (not admitted, however, by petitioner) in which the charges totalled more than $26,500.[5] The court could consider these injuries to

[3] See the affidavits attached to the petition for institution of the contempt proceeding. Item 1, Envelope 1, Record in No. 1043.

[4] See Attachment 5 to the reply to the corporation's answer, which is in evidence by stipulation. The reply is Item 20, Envelope 3, Record in No. 1043.

[5] See Attachments 8, 11, 12, 24, 36, 51, 55, 56, 65, 71, 76, 78, 80, 85, 92, 112, 121, 128, 130, 150, 153, 156, to the petition for institution of the contempt proceeding. Item 1, Envelope 1, Record in No. 1043.

the public, as well as the evidence in the record regarding petitioner's total sales,[6] in determining the appropriate fine to be imposed on petitioner.

Nor is there any merit to the claim that the fine must be abated because of the change in the corporation's management and operations (HF Pet. 8–9). The facts were presented to the court of appeals before sentencing and in petitioner's motion to modify the sentence, and they were, upon due consideration, rejected as a ground for reduction of sentence. The new management took on the corporation with its then-existing liabilities, which included the possible imposition of a fine for its unlawful conduct; the corporation should not be absolved of its criminal liability merely because it may prove expensive to its stockholders or creditors. In light of the substantial benefits derived by the corporation from its long use of the illegal practices—which presumably inured to the benefit of stockholders and creditors—it was not "harshly punitive" for the court of appeals to impose on the corporation a fine of $100,000.[7]

2. There is no substance whatever to petitioner's claim that the court was required to obtain a pre-sentence report before imposing a fine on the corporation.

[6] The corporation's total sales exceeded $29,000,000 in 1960 and $24,000,000 in 1961. 1961 Annual Report, p. 3, Envelope 13, Record in No. 1043.

[7] Section 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. 45(*l*), authorizes the imposition of a $5,000 civil penalty for each violation of a Federal Trade Commission order. In a civil suit, therefore, petitioner could have been penalized $125,000 for its 25 admitted violations.

Assuming *arguendo* that Rule 32(c) of the Federal Rules of Criminal Procedure applies to criminal contempt proceedings conducted in conformity with Rule 42, Rule 32(c) leaves it to the discretion of the court whether or not to request such a report. Moreover, the notion of a probation report with respect to a corporation is a singular one. Petitioner did not request such a report nor does it now suggest what such a report might contain or how it could be helpful to the court in determining the sanction to be imposed. Nor was petitioner deprived of any right of allocution or right to be heard prior to sentencing. Petitioner's counsel was heard before sentencing, and he then presented the facts regarding the changes in management—which were again presented to the court in the motion to reduce sentence.

3. The evidence was sufficient to sustain the conviction of petitioner Cheff. The court's finding that "he pursued a course of conduct designed to construct an apparent compliance with the order and to devise a defense against charges of violation" (HF Pet. 7a; C Pet. 23) is supported, *inter alia*, by petitioner's own testimony on cross-examination, wherein he admitted having taken no other steps in 1959 to obtain compliance than he had taken in 1952, in an earlier purported attempt—which he knew to have been ineffective—to stop the corporation's unlawful practices.[8] The record also supports the court's conclusion that petitioner "complained of recommendations to discharge sales-

[8] Compare Transcript 2065–2067 with Transcript 2080, Record in No. 1043.

men" who had violated the court's order and that with his "knowledge and approval * * * salesmen whom [the head of the complaint division] recommended discharging were praised in the [corporation's house organ]" (HF Pet. 7a; C Pet. 24). Petitioner was the author of an article making such a complaint, published on page 1 of the issue dated November 2, 1959 (Prosecution Exhibit 35).[9] That was the first issue after the head of the complaint division had recommended to petitioner that a salesman who had violated the court order be discharged.[10] The article complained about such discharge recommendations, and, in effect, repeated the same objection petitioner had made several days before in a letter to the corporation's counsel (Prosecution Exhibit 87). A special issue of the house organ published in March 1960 commended that salesman and others involved in similar incidents (Prosecution Exhibit 43).

Petitioner's related claim that the order did not put him on notice that failure to correct the practices engaged in by the corporation's salesmen might constitute a violation (C Pet. 6–11) lacks substance. The order directed the corporation and its agents to cease engaging in certain specified misrepresentations and deceptive or unlawful conduct "directly or through any corporate or other device." This adequately informed petitioner—the managing officer of the corporation—that if he did not take appropriate steps to modify his salesmen's practices, he could be held in contempt.

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[9] Transcript 789–790, 894–896, Record in No. 1043.

[10] Transcript 247–255, 783–787, Record in No. 1043.

The court of appeals listed a number of factors which "contributed to a condition which lent itself to undisciplined sales practices," included among which were certain details of the corporation's sales policies, organization, structure, and operations, and petitioner Cheff's management methods, behavior, and attitude (C Pet. 25). There is no merit to the contention (C Pet. 8–11) that Cheff had no notice that those factors were contributory to the corporation's use of the prohibited practices; the Commission so found in its decision issued over a year before the court order. 55 F.T.C. 55, 78, 88–89 (1958). The court clearly had the right to consider petitioner's actions in this context even though the policies, standing alone, might have been entirely lawful. Cf. *International Union, Etc.* v. *United States*, 177 F. 2d 29, 35–36 (C.A.D.C.), certiorari denied, 338 U.S. 871; *United States* v. *United Mine Workers*, 330 U.S. at 267. When the actual basis of Cheff's conviction is thus recognized, there plainly is no conflict between the decision below and that of the Ninth Circuit in *In re Floersheim*, 316 F. 2d 423 (1963).

4. The six months' imprisonment imposed on petitioner Cheff after denial of his demand for a jury trial is within the allowable punishment for a "petty offense" as defined in 18 U.S.C. 1(3), p. 2, *supra*. This satisfies the dictum in *United States* v. *Barnett*, 376 U.S. 681, 694–695, n. 12, as to the maximum permissible punishment pursuant to a non-jury trial. The issue involved in *Harris* v. *United States*, No. 526, this Term, is not, therefore, presented by this case.

CONCLUSION

For the foregoing reasons we respectfully submit that the petitions for writs of certiorari should be denied.

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MAY 1965.

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